Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM L. SCHOLL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT J. HIRSH
Counsel of Record
JEFFREY J. ROGERS
HIRSH, BJORGAARD & ROGERS, P.L.C.
177 North Church Avenue, Suite 700
Tucson, Arizona 85701
(520) 624-4700

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) In light of *United States v. Gaudin*, is it reversible error in a 26 U.S.C. § 7206(1) tax case to remove from jury determination the necessary element of materiality by erroneously instructing the jury that "any" omission of gross income from gambling, "regardless of the amount," is a material matter without allowing the jury to consider the evidence or lack of evidence of materiality, including, but not limited to, the insignificance of the omissions, offsetting deductions of gambling losses and evidence of the proper amount of taxes paid?

(2) Can a Defendant's status as a lawyer and state court judge support a permissible inference under *Ratzlaf v. United States* and other conflicting circuit opinions, of knowledge of the federal crime of structuring of bank deposits despite explicit evidence of lack of knowledge and the government's failure to present any independent evidence of knowledge?

(3) Whether the pervasive judicial bias, prosecutorial misconduct, and evidentiary errors so contaminated the trial proceedings as to deny the Petitioner a fair trial?

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PETITION FOR A WRIT OF CERTIORARI

William L. Scholl respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions below are unreported except for the opinion of the Ninth Circuit which is published and reported as *United States v. Scholl*, 166 F.3d 964 (9th Cir. 1999), Appendix A, and an order by the District Court which is published and reported as *United States v. Scholl*, 959 F.Supp. 1189 (D.Ariz. 1997).

JURISDICTION

The Court of Appeals entered its judgment on January 27, 1999. A timely petition for rehearing was filed on February 9, 1999, *see* Appendix B. It was denied and an amended opinion was filed on March 17, 1999. *See* Appendix A. Petitioner filed a request to enlarge time for filing his Petition for a Writ of Certiorari on June 1, 1999 because of the pending case of *Neder v. United States*, ___ U.S. ___ (1999). Justice O'Connor issued an order on June 2, 1999, extending the time for filing the Petition for Certiorari until July 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. Section 7206(1), *See* Appendix C

31 U.S.C. Section 5322, *See* Appendix D

31 U.S.C. Section 5324, *See* Appendix D

I. STATEMENT OF THE CASE

On December 5, 1995, a federal grand jury in Tucson, Arizona returned an indictment against William Scholl, Petitioner. *United States of America v. William Scholl*, District Court Cause No. CR-95-00576-TUC-1-ROS. The indictment

charged Petitioner with six counts of making and subscribing a false income tax return in violation of 26 U.S.C. § 7206(1) and five counts of structuring currency transactions in violation of 31 U.S.C. § 5324.

The basis of the false tax return counts was that Petitioner failed to report his gambling winnings on Counts Three through Six and part of Count Two. Count One and the other part of Count Two alleged that Petitioner failed to report income from discharge of indebtedness when he settled gambling debts in 1989 and 1990.

Counts Seven through Eleven alleged that Petitioner put his own cash in his bank account in more than one transaction.

Trial began on September 24, 1996. The Government rested on October 30, 1996. The judge granted a judgment of acquittal on Count Eight. The rest of the counts went to the jury on November 14, 1996.

The jury reached its verdict on November 19, 1996, finding Petitioner guilty of Part Two of Count Two, Counts Three, Four, Six, Seven, Nine and Ten, and finding Petitioner not guilty of Count One, Part One of Count Two (discharge of indebtedness), and Count 11 (currency transactions). Judgment and sentence was entered on February 27, 1997. The Petitioner was sentenced to five years probation with conditions.

II. STATEMENT OF FACTS

A. Background

Petitioner served as a State of Arizona Superior Court judge from 1984 until the conviction in this case, after which he resigned. His wife, Claire, worked as a sergeant with the County Sheriff's Department.

Since 1976, Petitioner took numerous vacations to Las Vegas, Nevada, usually as weekend getaways with his wife. Petitioner primarily played blackjack and craps. Petitioner never participated in any illegal gambling of any kind.

During the 1980's, he gambled on credit lines established at various casinos. In 1989, his losses mounted and he had

outstanding balances on credit lines with six different casinos. In the latter part of 1989 and the beginning of 1990, Petitioner settled his outstanding credit line balances. From that point forward, Petitioner continued to gamble in Las Vegas, but now only as a "cash" player through 1994, the last year listed in the indictment. As a "cash" player, his common practice was to purchase cashier's checks from his local checking account or personal home equity credit line, payable to the casino where he intended to stay in Las Vegas. Petitioner would then deposit the cashiers' check at the cashier's cage of that casino upon his arrival. Petitioner then drew against his cage deposit and gambled at various casinos during the trip. When his trip was over, he returned to Tucson and deposited his cash back into his checking account or personal home equity credit line account. The deposits back into his accounts generally were in increments of less than $5,000. See generally, RT 11-5-96, pp. 74-249.

B. The Casino MAC Reports On Which The Entire Case Was Based

The Government's entire case relied on casino marketing records (hereinafter "MAC logs") as the basis for all the tax and structuring counts of the indictment. To attract gamblers, casinos offer "comps," which are generally complimentary rooms, food and beverage. The amount of comps given customers is based upon a customer's theoretical losses. In order to arrive at an estimate of theoretical losses the casinos apply an "algorithm," an algebraic equation which computes a "hypothetical" loss for the gambler based on playing time, the house edge in the game and the speed of the play. The casino always assumes it will be a net winner over time. RT 9-18-96, pp. 217-221; 244-46; 266. The "MAC" logs contain estimates of gambling activity taken from player rating forms and records of all comps extended to the player.

A floor supervisor fills out the "player rating form" which later forms one part of the MAC logs. He or she supervises five to six blackjack tables watching the play of up

to 42 players. The supervisor has many other more important duties: secure the integrity of the game; make sure dealers follow procedures; handle customer conflicts and complaints; facilitate customers who need things, such as cocktails, show tickets, or meal "comps"; arrange to have the rack filled when it runs short of chips; arrange for chips to be taken away if the rack becomes too full; arrange credit for customers; observe fresh new shuffles of decks at any given table; observe any time cash is played instead of chips (dealer calls "cash plays"); observe any time cash is exchanged for chips, i.e., "changing $100"; observe any time certain denominations of chips leave a table; and, fill out the player rating forms. See generally, RT 9-17-96, pp. 109-123. Evidence at trial showed that casinos are fully aware that the "MAC" logs contain unreliable and untrustworthy estimates of a player's gambling activity and are, at best, only a guess.

Although admitted at trial over defense objections, the wholly untrustworthy nature of these casino MAC reports can be seen in the judge's rulings at the sentencing hearing. RT 2-27-97, p. 12. The judge held that they were not reliable enough for her to ascertain by a "preponderance of the evidence" that there was any actual tax loss.

The Judge reviewed the transcripts of the people who testified from the casinos:

> And without question, some of them said strenuously that the MAC records were *unreliable*, because the *motive for preparing* the MAC records were for the purpose of *determining comps*. . . .
>
> There was *no accountability for – for insuring that those records were accurate. It wasn't – those records weren't prepared for taxes. They weren't prepared for auditing*. . . .

Id., pp. 13-14. The judge noted that these records were "building speculation upon speculation." (p. 16):

> *You [the Government] have relied unequivocally on the MAC reports. I have found those MAC reports to be unreliable* for the purpose of showing that this – for this proceeding – and that is that they are more

> probable than not for establishing what his tax liability is.

Id., p. 22.

C. The Tax Counts Of The Indictment

Petitioner's defense was his belief that he could "net out" his gambling wins and losses on an annual basis. RT 11-5-96, pp. 130, 132. The evidence showed hat Petitioner believed he ended each year as a net loser (RT 11-6-96, p. 40) and therefore no gambling wins needed to be reported on form 1040.

The Government's key witness was Petitioner's certified public accountant, Ken Silva, who had been preparing his returns and working as his accountant for the last 17 years. RT 11-5-96, p. 140. Petitioner relied on Silva for tax advice and for advice on how his returns should be prepared. RT 11-5-96, pp. 140-144; RT 11-5-96, p. 205. Silva testified that he knew Petitioner was a gambler and that he had been gambling heavily over the years that he prepared Petitioner's tax returns. RT 10-8-96, p. 226. Petitioner always responded to his accountant's request for documents and information. RT 10-9-96, pp. 21, 22; RT 11-6-96, p. 61. Petitioner never seemed to express concern about paying his tax liability. RT 10-3-96, pp. 222, 233; RT 10-8-96, p. 243 (pretrial statement). Silva characterized Petitioner as an honest man and not a tax cheat. RT 10-19-96, pp. 21, 22.

Nowhere in Silva's extensive files does there exist any record, note, or letter to Petitioner, setting forth that Silva had advised Petitioner that he could not net out his losses against his wins. RT 10-8-96, pp. 244-261. Evidence reflected that Silva never gave him any more explicit information. Silva testified that in order to prepare Petitioner's returns, he would meet with Petitioner once a year for about 20-30 minutes at a Tucson restaurant. RT 10-18-96. The accountant would review last year's return and ask for any 1099 forms. He then prepared the return and mailed it to Petitioner for Petitioner and his wife to sign. RT 10-30-96, p. 308.

were: (1) Petitioner's state of mind when he signed his tax returns (i.e., was it willful); and, (2) whether the alleged misstatements were material.

The evidence in the case showed that Petitioner purchased cashier's checks before going to Las Vegas. RT 11-5-96, p. 207. It also showed that when he returned from Las Vegas, whatever was left of his money was always redeposited in the bank. RT 11-5-96, p. 208.

The redeposits form the basis of the structuring counts, discussed below. There were complete bank records of all the money brought back from Las Vegas. The testimony presented in the case showed that in the five years in question, Petitioner's cashier's checks taken for Las Vegas gambling exceeded the amount returned and deposited in the bank. He was, thus, an overall loser at gambling.

The Government never attempted to prove this case by a net worth analysis method. The Government totally relied on the casino MAC reports to prove wins/losses, the source of "structured" deposits and amounts of each. Notwithstanding the foregoing, a review of the "financial statements"[1] in question coupled with Petitioner's testimony showed that there was no increase in net worth.

D. The Structuring Counts

Petitioner testified that he was generally aware of the requirement by the bank to report currency transactions, although he was not aware of any of the details. RT 11-5-96, p. 215. Petitioner stated, however, that he was not aware that making deposits in that fashion was illegal. He testified, "But I had never, absolutely never heard of this crime of structuring. I thought that there was absolutely nothing wrong with the way a person put their own money in the bank. And, I couldn't believe that it's a crime to differentiate between putting your money in the bank in one time, or putting your own money in the bank in three times." RT 11-05-96, p. 145.

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[1] The "financial statements" were really loan applications.

There is no evidence that Petitioner ever hid money or concealed his manner or method of bank deposits. The evidence showed that all his money ended up in his account. The structuring counts that Petitioner was convicted on were from transactions in 1991, 1993, and 1994. On these occasions, Petitioner returned from Las Vegas with his own money, which was redeposited in his bank account.

E. Summary

In this case, the evidence was that Petitioner had a good faith belief that gambling winnings could be "netted out" at the end of the year. He believed at the time of filing his returns that he had lost money and evidence indicated he was, in fact, an overall loser. He believed that in all years covered by the indictment, his losses equaled or exceeded his gains and therefore a declaration of income was not required on his Form 1040, unless Petitioner received a 1099 or W2G. Moreover, the Government conceded in the indictment that Petitioner had net losses for two of the years charged, yet filed the charges anyway. Petitioner testified and his counsel attempted to argue that the misstatements on the tax returns were not only unintentional (i.e., not willfully false), but also were not material because his losses exceeded his wins. The entirety of this argument was nullified by the court's improper materiality instruction – tantamount to ordering a directed verdict on the tax counts.

Petitioner further testified that he believed it was not unlawful to deposit his own money into his bank account in more than one deposit. As to the five counts of structuring currency transactions, Petitioner was not aware that the act of structuring was illegal.

The jury could not fairly determine Petitioner's state of mind because of the overall unfairness of this trial, especially the unfair character assassination of Petitioner permitted by the trial court judge during the prosecutor's cross examination of Petitioner and his witnesses.

Petitioner was convicted of four counts of filing a false tax return and three counts of structuring currency deposits.

Petitioner appealed from those convictions. The Ninth Circuit affirmed the conviction.

III. REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Published Opinion Is In Conflict With The Supreme Court's Decisions In *Neder*, *Gaudin* And The Circuit's Own Recent Decision In *Uchimura*. The Ninth Circuit Should Have Followed These Cases And Reversed All Tax Counts Finding That The District Court's Materiality Instruction Was Reversible Error As A Matter Of Law Because Materiality Was A Contested Issue; There Was No Evidence Of Materiality Presented By The Government; And, The Element Of Materiality Was Never Decided By The Jury.

Since *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed. 2d 444, 116 S.Ct 2310 (1995), it has been decided as a constitutional matter that the issue of materiality must go to the jury. Petitioner pointed out to the District Court that *Gaudin* required that this issue be submitted to the jury. Following *Gaudin*, in *United States v. Uchimura*, 125 F.3d 1282 (1997), the Ninth Circuit further held that *Gaudin* applies to 26 U.S.C. § 7206(1) tax cases. *Id.* at 1283-4.

Nevertheless, the District Court, over Petitioner's repeated objections, relying instead on *United States v. Holland*, 880 F.2d 1091 (9th Cir. 1989), instructed the jury, in part:

> If you find the defendant made a false statement on his tax return relating to ***gross income***, ***regardless of the amount***, that is to say, if you find that the defendant received income in addition to that reported on his tax return, ***regardless of the amount***, **then** ***such omission of income is a material matter***.

RT 11-14-96, p. 142, emphasis added. The prosecutor made essentially the same argument to the jury during his opening statement, over Petitioner's objection. RT 10-01-96, pp.

75-77. Thus, not only did the court give an incorrect materiality instruction, taking the issue from the jury, the Government was allowed to take full and unfair advantage of this in argument to the jury.

Contrary to the Ninth Circuit's suggestion that Petitioner did not object to this incorrect instruction, Petitioner repeatedly objected to the Court's materiality instruction on at least nine different occasions, often at great length. *See* RT 11-04-96, pp. 6-10, 98-101; 11-12-96, pp. 7-27, 93, 95-107; 11-13-96, pp. 318-320; 11-14-96, pp. 6-10, 117-118; 11-19-96 pp. 141-2. Moreover, Petitioner offered a proper instruction based on *Gaudin*.

As to this disputed materiality, it must be remembered that the Government's evidence here was so tenuous that no tax loss could be shown by the Government. *Scholl* at 981. Moreover, the Government failed to present a scintilla of evidence or testimony that the alleged omissions on the tax returns were material to the I.R.S. in any manner as required by *Gaudin*. Had this jury been properly instructed, it might well have decided along the lines of reasoning suggested in *Uchimura*, i.e., that

> . . . just because a jury usually would agree with such a statement does not mean that a jury must agree with it as a matter of law. Even if a failure to report income is material in *most* circumstances, *it is not necessarily material in all circumstances*, since materiality of the underreporting of income *necessarily depends upon the facts of each case*. . . .

Uchimura, 125 F.3d at 1285-6, emphasis in original. The *Uchimura* Court further suggested:

> As a more cogent example, *if one's legitimate deductions exceed one's true gross income, taxable income will be zero*. Failure to report all income will thus have no effect on taxes owed, at least for that year, and unreported income may not be necessary to a determination of whether income tax is owed.

Id. at 1285, emphasis added. The Court continued in a footnote: "That no additional tax is owed of course has a bearing on materiality, but the question is ultimately one for the jury to decide." *Id.* at 1285, fn. 5.

Recently, in *Neder v. United States*, ___ U.S. ___ (1999), this Court examined whether taking the materiality issue from the jury could ever be harmless error. However, in *Neder*, the defendant failed to report over five million dollars in income. *Neder* did not contest materiality and unlike here, there was no issue of offsetting deductions. Instead, *Neder*'s only defense revolved around advice of attorney or accountant. Justice Scalia, in a footnote to his dissenting opinion, observed that the suggestion that total income is obviously information necessary to a determination of a taxpayer's income tax liability is not valid. He further stated, "If that analysis were valid, we could simply dispense with submitting the materiality issue to the jury in *all* future tax cases involving understatement of income; a finding of intentional understatement would be a finding of guilt – no matter how insignificant the understatement might be, and no matter whether it was *offset by understatement of deductions as well*." *Id.*, *Neder*, ___ U.S. at ___, emphasis added.

This case represents the exact factual scenario that troubled Justices Scalia, Souter and Ginsberg in their dissent in *Neder v. United States*, *supra*, and was alluded to in *Uchimura*, *supra*. In the present case, the jury should have been allowed to decide the contested issue of materiality instead of being instructed that "*any* omission of income, *regardless of the amount*," constitutes materiality as a matter of law. Moreover, this case raises directly the issue of whether *Holland*, *supra*, which is still used by several courts in defining materiality, is still good law in light of *Gaudin*.

The Government's case was tried, in the words of the prosecutor, under the *Holland* theory that materiality is proved by omission of even one dollar of gross income: "the law is that *any* unreported income, even, technically speaking, *the amount of $1.00*, under Ninth Circuit law, it's very clear if there's $1.00 of unreported gambling income, these tax returns are false." RT 06-20-96, p. 167, emphasis added.

Defense counsel responded by saying, "Well, Judge, I respectfully disagree with counsel. The other requirement is materiality. And I don't believe that if there is a false return that is a dollar off that that is a material perjurious statement that a jury can act upon or a judge can act upon. There must be a material falsity set forth in that return." *Id.*

One example of this factual materiality dispute can be demonstrated in count 4 of Petitioner's indictment, for which he was convicted, which reads: "That on or about the following dates during the calendar year 1992, William L. Scholl did win/(lose) at gambling in the approximate amounts, as follows:"

Date	Casino	Net Results on Trip	
02/18/92	Golden Nugget	$900	won
04/18/92	Golden Nugget	($18,700)	lost
05/04/92	Golden Nugget	$15,100	won
10/25/92	Golden Nugget	($16,400)	lost
11/12/92	Golden Nugget	($9,100)	lost
	Total	**($28,200)**	**lost**

Thus, the Government alleged that in 1992, Petitioner won $16,000, but lost $44,200, for a *net loss* of $28,200 for the year. Yet under the Government's theory and the court's mistaken materiality instruction, the jury was ordered that "any" omission of gross income was material as a matter of law. This ordered the jury to find that if Petitioner did not list the $16,000 as income on his form 1040 under "other income," even though he was permitted to deduct $16,000 on schedule A, the "omission" was a material omission as a matter of law, despite the fact that Scholl apparently paid the proper amount of taxes in each year.

Here, the Ninth Circuit opinion suggests that, despite the absence of any showing of materiality by the Government, it is axiomatic that every juror would know that a statement of zero ultimate winnings by a gambler who had both wins and losses in the year would be capable of influencing the I.R.S. *Scholl* at p. 980. The Ninth Circuit has, in essence, done what *Gaudin* and *Uchimura* both expressly forbid – i.e., ruled as a matter of law that Petitioner's statements or omissions were

material and ordered the jury to find as such – despite the factual disputes on this issue.

Because of the District Court's erroneous materiality instruction, defense counsel was prohibited from arguing materiality to the jury even though Petitioner testified that if "you don't have any income, there's nothing to report" (RT 11-05-96, p. 152) and "if you don't make any money, there wasn't anything to put on the tax return." RT 11-05-96, p. 150. Petitioner's belief that losing money gambling did not require a declaration on form 1040 and the fact that he did lose more than he won go to the very heart of materiality. As Petitioner stated, "from what I understand of a tax return, the purpose is to figure out how much money you owe in taxes and pay it, which I did every year." RT 11-07-96, p. 440.

The Court should grant certiorari to resolve the contradictions between this published case and the *Neder*, *Gaudin*, *Holland*, and *Uchimura* decisions. With legalized gambling now permitted in 48 states, this case directly raises on its facts the very issues which will now be confronted by every person who gambles to the slightest degree or buys a lottery ticket: "Is it always material, as a matter of law, that some offsetting wins and losses are not specifically reported on form 1040?" or, must this be left to a jury to decide? Finally, in light of *Gaudin*, *Holland*'s definition of materiality cannot be valid as a matter of law, especially in the gambling arena. Otherwise, a person could be prosecuted for serious tax felonies for failure to record each and every win no matter what the overall result or amount of offsetting losses. Should the gambler record the result of each roll of the dice, or each hand of blackjack, or each lottery ticket which wins five dollars . . . ?

B. The Petition For Certiorari Should Be Granted To Maintain Uniformity Between Various Circuit's Decisions And Resolve The Conflicts Between This Published Case And Existing Authority In Other Circuits Regarding What The Government Must Prove To Substantiate A Structuring Conviction Under *Ratzlaf* And Whether "Status" Alone Can Constitute Sufficient Evidence Of Knowledge That Structuring Is Illegal.

1. Introduction

Petitioner has found no published decision where a defendant was convicted of structuring his own lawfully obtained money by withdrawing it from his bank account and then openly re-depositing it back into his account. As can be seen from the indictment, Petitioner's deposits to his bank accounts did not greatly exceed the $10,000 threshold amount, and most often merely reflected a deposit of the same money he had withdrawn just prior to his Las Vegas vacation. For example, in 1993, Petitioner was found not guilty of the tax count (count 5), but was convicted of structuring money immediately after returning from a vacation that year. The evidence at trial showed that the defendant obtained cash by check and his credit card in the amount of $19,000. When Petitioner returned home he deposited $15,200 (i.e., he *lost* $3,800) back into his account in four separate deposits to cover his credit card withdrawals and the check he cashed to initiate the trip. RT 11-6-96, pp. 220-223; RT 11-5-96, p. 176.

Likewise, in 1991, Petitioner took a cashier's check in the amount of $20,000 to Las Vegas and then redeposited $22,000 during an eight day period following his return (Count 7). RT 11-6-96, p. 260.

In his brief and at trial, Petitioner argued that the Government failed to satisfy the requirement that it must prove Petitioner *knew* structuring was illegal. In *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), the Court held that the government must prove *beyond a reasonable doubt* that the defendant had *actual knowledge* that structuring was illegal. Following *Ratzlaf*, Congress

amended the statute to eliminate the specific knowledge requirement. Because all structuring counts on which Petitioner was convicted involved deposits made *prior* to this change, *Ratzlaf* and those cases interpreting it apply.

In this case, the Government supplied *no* independent testimony or evidence to meet the *Ratzlaf* requirement of knowledge. The Ninth Circuit opinion in this case held that the jury could have inferred knowledge because of Petitioner's *status* as a lawyer and judge, the manner in which he made his deposits, and the jury's right to disbelieve his testimony. The Ninth Circuit states that while the evidence was "not overwhelming," it was apparently sufficient. *Scholl*, at p. 979.

Variations in how the circuits interpret *Ratzlaf* stem from analysis of the Court's footnote indicating that "[a] jury may . . . find the requisite knowledge on defendant's part by drawing reasonable inferences from the evidence of defendant's conduct." 114 S.Ct. at 663, fn. 19. In *United States v. Tipton*, 56 F.3d 1009, 1013 (9th Cir. 1995), the Ninth Circuit interpreted this footnote to allow consideration of circumstantial evidence in determining knowledge.

2. Allegations of Concealment Are Not Supported by the Record

The Ninth Circuit stated that whenever Petitioner made two deposits on the same day, he made deposits at different banks. *Scholl* at 979. The evidence as to these two counts of conviction showed only two deposits to different banks on two days: July 3, 1991, $700.00 to Security Pacific Bank and $4,700.00 to Citibank; and two years later, November 8, 1993, $4,500.00 to Bank of America and $3,500.00 to Norwest. Neither day was the total of the deposits anywhere near $10,000.00. This cannot compare to the Court's invocation of *United States v. Beidler*, 110 F.3d 1064 (4th Cir. 1997) ($33,000.00 at seven branches in a five hour period).

Petitioner routinely made deposits in his regular bank accounts, usually on his lunch hour, walking to the bank across the street from the court. RT 11-5-96, pp. 209-211. He

did not engage in suspicious or furtive behavior. There was no evidence that Petitioner engaged in concealing deposits.

3. Status, Education and Experience

With respect to the Ninth Circuit's opinion that, because Petitioner was a lawyer and state court judge, the jury could infer that he knew his acts were illegal (*Scholl* at 979), no case so holds. Cases which have permitted experience and education have all been significantly different than this case.

For example, in *United States v. Simon*, 85 F.3d 906 (2nd Cir. 1996), the defendant was a stock broker who was intimately familiar with cash transaction reporting requirements. In *United States v. Tipton*, 56 F.3d 1009, 1013 (9th Cir. 1995), the defendants were bank officials with cash transaction experience from which a jury could infer they knew structuring violated the law. *See also*, *United States v. Diamond*, 788 F.2d 1025, 1029 (4th Cir. 1986) (CPA's education and experience suggested an extraordinary sophistication with respect to tax matters and could support inference of knowledge.) *Cf. United States v. Pipkin*, 114 F.3d 528 (5th Cir. 1997) (despite the fact that Pipkin was a former bank president in the 1970's when CTRs were required, was later an investment company president in the 1980's and attended two years of law school, this was not sufficient to support an inference of knowledge of the illegality of structuring.)

Likewise, this is not a permissible inference that can be drawn from Petitioner's status. In his status as a state court judge, there was absolutely no conduct by Petitioner which would show any knowledge of the illegality of structuring his own money. *Ratzlaf* referred to "conduct," not status and specifically held that the presumption of knowledge of the law did not apply to structuring because, like tax laws, structuring laws are so esoteric and obscure that the Government must prove Petitioner's knowledge of structuring illegality in order to convict. *Ratzlaf* also observed that "structuring" is not, in and of itself, evil and that knowledge of the law could not be inferred from only the acts of structuring. The principal purpose of the statute was to curb money laundering "by

which criminals have successfully disguised the nature and source of funds from their illegal enterprises." *Ratzlaf*, 114 S.Ct. at 661, n. 11.

Here, evidence showed that Petitioner became a *state court* judge more than two years before federal laws were changed to make structuring a crime. He had no knowledge of structuring laws and never practiced federal criminal law prior to taking the bench. RT 11-5-96, pp. 87, 215. Two other state court judges testified at trial that they too were unaware of structuring laws. A state court judge would have no reason to know such esoteric areas of federal criminal law such as currency transactions.

4. Petitioner's Testimony

The Ninth Circuit further suggested that Petitioner testified that he did not know structuring was illegal and that the jury did not believe him, *Scholl* at 979, citing *United States v. Kenny*, 645 F.2d 1321, 1346 (9th Cir. 1981) (a defendant "risks that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth"). The *Kenny* court, however, added that, "*Coupled with the independent evidence presented*, Oelberg's testimony forms an adequate basis for the jury's verdicts." *Id.*, emphasis added. No such *independent evidence* exists in the case at bar.

There is no reported opinion sustaining a *Ratzlaf* claim on the slight evidence in this record. *See United States v. Ismael*, 97 F.3d 50 (4th Cir. 1996) for further in-depth analysis. Additionally, Petitioner's credibility could not be fairly assessed by the jury due, in part, to the reasons set forth below. There is absolutely no evidence that Petitioner knew that the type of structuring he did was illegal. This is a case where the Government was allowed to ensnare and convict an individual who believed he was involved in innocent conduct.

C. This Court Should Use Its Supervisory Power To Review The Proceeding Below Because The Trial In This Case So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Justify The Granting Of A Petition For Certiorari. Petitioner's Credibility Was Unfairly Destroyed Through Improper Cross-Examination Of Petitioner And His Witnesses By An Overzealous Prosecutor And Permitted By A Biased Trial Judge.

1. The Trial Fell Below Basic Standards Of Fairness In Federal Court

Petitioner's trial was undermined by far-reaching prosecutorial misconduct which was tolerated by the trial court judge. Government prosecutors engaged in unfair cross-examination of Petitioner and Petitioner's witnesses. Prosecutors in their cross-examination of witnesses and in arguments to the jury, asked questions or made statements creating unfair inferences in violation of established law. *United States v. Bush*, 58 F.3d 482 (9th Cir. 1995); *United States v. Brooke*, 4 F.3d 1480 (9th Cir. 1993). In essence, the prosecutors made this a case which revolved mostly around the fact that Petitioner was a judge who gambled. At every turn, the prosecutors were allowed, even encouraged by the trial court judge, to exploit the inherent prejudice of a judge who engaged in such unpalatable behavior.

This misconduct included the following inappropriate behavior by the Government: (1) untrue suggestions in cross-examination of Petitioner that his acquittal in this case would resolve pending actions before the Commission on Judicial Conduct and allow him to return to the bench; (2) unfairly suggesting judicial corruption by asserting Petitioner borrowed money from attorneys appearing before him; (3) repeated questioning of Petitioner suggesting his responsibility to disclose his compulsive gambling to litigants in his court, to taxpayers, and persons of authority in the judiciary; (4) questions to witnesses falsely suggesting Petitioner was transferred from superior court to juvenile court due to

implied misconduct; (5) questions falsely suggesting Petitioner abused attendance and vacation policies at the juvenile court; (6) falsely suggesting to a character witness that Petitioner improperly obtained funds from the conservatorship of his disabled son; (7) falsely suggesting in cross-examination of Petitioner that he violated Canons I and II of the Canons of Judicial Ethics; (8) falsely suggesting to the jury that Petitioner lived an opulent lifestyle; (9) falsely suggesting that Petitioner contrived a "defense of compulsive gambling," notwithstanding the court's exclusion of expert testimony on this issue; (10) prosecutor's statement to the jury in opening and closing arguments that Petitioner could never prove compulsive gambling affected his ability to fill out Form 1040, knowing Petitioner was prohibited from presenting such evidence to the jury.

The District Court judge demonstrated pervasive bias in favor of the Government and against Petitioner throughout the entirety of the trial. This necessitated three detailed motions to recuse the judge, all of which were denied. The District Court, on numerous occasions, issued *post hoc* orders well after the conclusion of contested hearings. In many instances, these orders did not conform to the record. Some of the findings in these orders were included in the Panel's opinion. The demonstrated bias was far too extensive to be fully briefed in this Petition. Only a few examples follow.

2. The Canons Of Judicial Ethics

The prosecutor was permitted to lodge a vicious smear attack on Petitioner because he was a State Superior Court Judge. In this tax and structuring case, Petitioner was asked over objection on cross-examination:

> Q. BY MR. FINK: Now, Judge Scholl, there is a – a code of conduct or a code of ethics that has been adopted by the Supreme Court of the State of Arizona that applies and has applied to superior court judges such as yourself, is there not?

* * *

Q. And – and the code of conduct consists of ethical principles which all judges, including yourself, were to comply with in connection with your service as a judge, correct?

* * *

Q. But isn't it fair to say that these, the judicial code of conduct contains these ethical principles and they set forth general principles or guidelines by which you are to operate as a judge?

RT 11-13-96, at pp. 73-76, ER34.

Q. BY MR. FINK: Were you aware during the time frame of this case, covered by this case, 1989 through 1994, that the first canon or the first ethical principle of the Judicial Code of Conduct was that a judge should participate and maintain high standards of conduct and shall personally observe those standards of conduct?

* * *

Q. And isn't that common sense, then, as well, that as a judge you have an ethical duty to maintain high standards of conduct and personally observe those standards of conduct?

Id. at pp. 78-79.

Q. And were you aware that there's an additional canon or ethical principle that a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary?

* * *

Q. And, sir, isn't it also correct that that would include how you conduct yourself on the bench and off the bench?

* * *

Q. You would agree, would you not, that when you became a judge, you agreed to accept a level of scrutiny with respect to your private life, your personal life?

Id. at pp. 80-82.

Q. BY MR. FINK: Do you believe, Judge Scholl, that signing gambling markers and losing $170,000 in gambling in casinos, which was more than you could afford to lose, was consistent with your ethical obligations as a judge to observe high standards of conduct and to act at all times in a manner that promoted public confidence in the judiciary?

* * *

Q. Do you believe that serving as a judge, while asserting as a defense to those debts that you had an addiction and an alcohol intoxication, asserting that as a defense to those debts was consistent with your ethical obligations to maintain high standards of personal conduct and at all times to act in a manner that promoted public confidence in the judiciary?

Id. at 83-4. The examples set forth above are merely the tip of the iceberg of this line of questioning.

3. Cross Exam On Use Of Vacation Time And Violation Of Attendance Policies

One of Petitioner's character witnesses, retired appellate court Judge Lacagnina was asked on cross:

> Had you heard, Judge, that a Judge Nanette Warner, who is the presiding judge of the juvenile court to which Judge Scholl was assigned, *was of the opinion* that Judge Scholl had abused the attendance policies of the court, *leaving the court routinely at 3:00 to 4:00 p.m. daily, and that he had taken more*

> *than his allotted 23 days of vacation time*; specifically as of June of one year had taken 29 days vacation time when he'd only been allotted 23?

Id., at pp. 196-7. Petitioner denies the substance of the question.

Previously, the prosecutor insinuated in a question to one witness that Petitioner had been demoted to the juvenile court as a disciplinary measure. The prosecutor well knew that the witness would answer otherwise, yet persisted in asking the question creating the adverse inference.

Petitioner was asked numerous questions about the propriety of his actions while serving as a judge with the prosecutor insinuating improprieties in the filing of his financial disclosure statements, loans, and court-approved reimbursements from his disabled son's court controlled conservatorship account.

4. Cross-Examination On Compulsive Gambling Disorder

Petitioner was cross examined about his failure to tell juvenile and adult defendants and the "taxpayers" of the State about his compulsive gambling addiction while sitting as a judge:

> Q. And how about, did you have people who appeared before you in cases while you were a judge, defendants who were using addictions and diseases as defenses?

Id., at p. 177.

> Q. BY MR. FINK: Did you have cases in which you presided where defendants appeared before you who were asserting that they had an addiction or disease?
>
> * * *
>
> Q. BY MR. FINK: You were presiding criminal [chief judge] – you were presiding over criminal cases for some period of time, isn't that correct?

* * *

Q. And at the time when you served over criminal cases in the juvenile court, isn't it true you had defendants who came before you who were – who believed or claimed that they had addictions and diseases?

Id., at pp. 177-79.

Q. BY MR. FINK: Isn't it true that you presided over juvenile cases where juveniles would come before you with addiction problems?

* * *

Q. BY MR. FINK: And when you had cases involving juveniles who were asserting an addiction problem, *did you make disclosure to any of the parties before you that you believed that you also had an addiction problem*?

Id., at pp. 179-80, emphasis added.

Q. Any kind of statement [that he had a gambling addiction] that would come to the awareness of taxpayers of the State of Arizona?

* * *

Q. BY MR. FINK: Any time – sir, the taxpayers of the State of Arizona in Pima County are your employers, aren't they not?

* * *

Q. When is the first time that you would have made a disclosure of the fact that you believed you were a compulsive gambler –

* * *

Q. BY MR. FINK: – that would have come to the attention of the public in the State of Arizona?

* * *

Q. BY MR. FINK: Judge Scholl, when is the first time that you made a public statement that would come to the attention of the taxpayers

that you believed that you were a compulsive gambler?

Id., at pp. 181-84.

5. Improper Cross Examination Prohibited By *Doyle v. Ohio*

As a consequence of a question asked by a juror in a note to the District Court judge, (*See*, RT 11-13-96, pp. 156-157) on re-direct exam, Petitioner was asked a single question by defense counsel regarding a civil audit. Defense counsel was extremely cautious in how the question was asked, and even backed up and re-stated the question to make it absolutely clear how narrow this question was:

Q. Did you ever receive a request from Mr. Meyers [IRS agent] or Mr. Fink [the prosecutor] – well, *let me ask you this: did anybody come to audit you for the year where you could sit down with them and say, 'here are my papers,' and go over this*?

A. Nobody gave – . . .

*****

Q. Did you ever have an opportunity to provide documents to anybody *in that context* . . . **[i.e., a civil audit]**

A. I was never given the opportunity to present documents or cooperate as I had requested.

RT 11-13-96, pp. 120-121, emphasis added. In fact, Petitioner was never audited.

The Ninth Circuit held that this "opened the door" for over 20 improper questions, all of which Petitioner contends violate *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and its progeny.[2]

These questions attacked Petitioner's silence before and after the indictment, attacked his retention of counsel,

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[2] Defense counsel invites the Court to read all of the improper questions by the Government on re-cross, once the record becomes available to the court. *See, e.g.*, RT 11-13-96, pp. 195-214.

inquired into advice given by counsel, and implied he had a burden to prove his innocence and present evidence of innocence to the prosecutor *before* trial.

A *few* examples of these questions follow:

Q. And so there is a, approximately a seven- or eight-month interim between the time when you learned of the indictment – that you were under investigation and when the indictment was returned –

A. Correct.

Q. – correct? And during that interim time period, sir, wouldn't you agree with me that there was nothing to – to preclude you, to stop you from, you know, preparing a document, a letter or a memorandum, setting forth whatever information it was that you would want to provide to the government to try and head off an indictment?

* * *

Q. BY MR. FINK: And so, sir, when you became aware of the investigation in the middle of 1995, you were aware that it could involve structuring, gambling and taxes, and you never, *in the interim from when you learned about the indictment till the time the indictment was returned, you never prepared any kind of letter or memorandum or document setting forth, you know, any position that you might have had that you would want us to consider in the investigation. You never did that, did you*?

* * *

Q. And Mr. Weiss [Petitioner's attorney at the time] advised you, gave you some advice about – not to do so [not to prepare any informative document for the Government], is that right?

* * *

Q. What you're telling us now is that when you learned of the investigation you were in no

position – you were being given advice [i.e. by an attorney] not to do so or you were in no position to do so.

* * *

Q. And, sir, would you agree with me that there was – there was *nothing to preclude you or to prevent you from just sitting down, writing out your version* of what happened, or any position or any information that you wanted *to submit to the Government at that time*, that there was nothing to stop you from doing that.

* * *

Q. BY MR. FINK: *And their [i.e. your attorney] advice was – was not to present documents and not to cooperate.*

* * *

Q. By Mr. Fink: No. Sir, was it based upon the advice of your attorneys that you did not do what I've suggested, that is, the preparation of a document setting forth your position about what had happened?

RT 11-13-96, at pp. 195-202, emphasis added.

Q. And *after the indictment was – was returned*, would you agree with me that there was nothing that would prevent or preclude you from presenting any evidence, any documentation, any version of your – your side of the story at all to the Government?

* * *

Q. And would you agree with me, however, that regardless of – of what you were willing to agree or what we were willing to agree to as part of a meeting, my question to you was: There was nothing at any time to preclude you from presenting whatever information, whatever cooperation you wanted, by presenting this information in writing?

* * *

Id., at pp. 203-208. Defense counsel objected to this entire line of questioning on *Doyle v. Ohio* and other grounds, but was repeatedly overruled.

Following the impermissible questioning (20 pages of transcript), Judge Silver then exacerbated the prejudice by stating the inference forbidden by *Doyle* and instructed the jury:

> You should – I want to remind you, you must understand, as I have told you before, the defendant has no burden to prove his innocence. That's an important principle. But ***you should also understand that nothing in the law***, despite that principle, and that principle pertains throughout this trial, that ***nothing precludes him, if he chooses to do so, from providing documents or information to anyone, the Government or anyone else***.

(emphasis added), RT 11-13-96, at p. 212, ER34. The District Court judge should not have allowed the prosecutor to bludgeon the defendant repeatedly about his silence and reliance on counsel because there was no evidence the Defendant's testimony was inconsistent with his pre-trial behavior. *See*, *United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1286 (9th Cir.), *cert. denied*, 459 U.S. 911, 103 S.Ct. 219, 74 L.Ed.2d 174 (1982).

6. Other Improper Cross Examination

Other improper cross examination allowed by the District Court included questions about Petitioner's membership in a country club, ownership of a rental property, ownership of a one week time share, and purchase of a ring. All of these questions had no relevance to the charges[3] and tended to unfairly and falsely portray Petitioner as living an opulent lifestyle.

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[3] The Government's case was never based on any net worth analysis. The entirety of the charges was based on the casino reports, *supra*.

7. The Trial Judge's Behavior

It is virtually impossible to cite every reference, chapter and verse where favoritism was shown to the Government or extraordinary bias or outright hostility was demonstrated by the court against Petitioner or his attorney in this case. One of the more unusual events occurred during defense counsel's closing argument.

As Mr. Hirsh was conducting closing argument, Judge Silver mouthed the word "object" or "stand up" to the prosecution. None of this came to the attention of counsel until after the case had gone to the jury. Counsel then brought this to the attention of the court by submitting an affidavit by a member of the audience who witnessed this behavior by the judge. A hearing was held. *See, e.g.*, RT 11-19-96, pp. 1-18, ER36. Mr. Hirsh pointed out to the court that witnesses told defense counsel that they saw Judge Silver mouth the word "object" towards Mr. Fink during Mr. Hirsh's closing argument, and that the judge then put her hand over her mouth as if embarrassed to have done it and thereafter sustained an objection when Mr. Fink did in fact object. *Id.*, pp. 3-4. The judge admitted the conduct and attempted to explain:

> *There was one point, and I can't determine if this is precisely the point*, where I believe there was a statement made by you that could have – *could have been* a violation of ***my*** original motion in limine on the question of whether or not you could argue that the prosecution was prosecuting the defendant because he was a judge. *And Mr. Fink looked at me with compelling, almost imploring, an imploring look, and my view was I was not going to interject. And my response was not that there was an objection. My response was, and* **I mouthed the response**, and I don't know if you remember it, I said: get up and that I would decide whether or not an objection was appropriate.

Id., p. 6, emphasis added.

Defense counsel asked "Would that have been on the record, Judge, that remark you made?" The Court responded

"Oh no." (*Id.*, p. 6) "I mouthed it." *Id.*, p 7. The judge then explained further:

> But importantly, when I did so, because of my concern of the jury . . . *I turned away from the jury* which most likely is the reason why that young woman over there . . . anyway, there was a woman with dark hair. She may – she may have seen my mouth move. I made absolutely sure that the jurors did not focus on me.

Id.

It should be noted that, during the arguments as to what the nature of this conduc by the judge was, the judge clearly did not remember *when* the incident occurred. Moreover, the prosecutors advised that they did not notice that it occurred at all. On several months' reflection, the judge, however, was able to finally pin down the *exact moment* at which this misconduct occurred in her written order in which she vilified defense counsel for over four pages. In addition, the prosecutors, who denied they saw the event occur at all, are now absolutely certain as to *when* this event appears to have occurred.

In fact, defense counsel inquired of the court whether or not there had been other improper communications between Mr. Fink and the trial judge during the trial. RT 11-19-96, p. 11. Ms. Lopez, an attorney assisting the defense, was present for closing argument and several other days of trial. She advised the court as follows:

> Judge, I really think the best way to describe it is most of *what I've observed has been eye contact, nonverbal communication, much like the event that happened Thursday at the closing argument.*
>
> It's just a visual contact that you make, and it's along the lines of what you were describing: *You saw a look on Mr. Fink's face of one imploring you.* But I think there have been occasions throughout the proceeding where I have observed that kind of behavior. And it's – *it's a most curious thing to me but I think it happens unwittingly.* I think you are not aware that it does occur, much like most of us as human beings would engage in eye contact or non-verbal communication with people, sometimes

> we're not aware of it. *But it has occurred and I've observed it periodically.*

Id., pp. 12-13, emphasis added. The court went on to try to explain stating: "So the eye contact with Mr. Fink has been, if anything, it's been minimal. It certainly hasn't been adverse. *I haven't been casting spells on him or, you know, transcend – transcendingshal – .*" *Id*, p. 13, emphasis added.

This conversation on the judge's nonverbal communication with Mr. Fink continued:

> *The Court*: Anyway, he [Mr. Fink] does have expressions, and I have noticed those expressions, the same with Mr. Miskell and I – *I felt he was saying to me, he was imploring me, you know, jump in, you know, jump in.*
>
> *Mr. Hirsh*: Mr. Fink was imploring you by nonverbal communication to jump in?
>
> *The Court*: Sort of like: Is anything going to happen here? *And frankly, I was wrong.* He's not that way. He wasn't asking me to do anything. But I took it that way, so it's my fault, and I basically – I didn't say "object," because *frankly at the time I didn't remember what the objection would have been. I said: Stand up. That's what I meant, stand up, and if you could read the words, stand up, from my mouth.*

Id., p. 1415, emphasis added. The court later admitted possibly she said "Get up." The court denied that it had made any kind of comments of the nature of "object." Later, the court began to dispute about what the volume of what she said during this incident. Her conversation was as follows:

> *The Court*: Well, if it was inaudible, how was your attention drawn to it?
>
> *Ms. Lopez*: Because of the uniqueness of the low level of volume.
>
> *The Court*: There was no volume at all.
>
> *Ms. Lopez*: I believe there was, Your Honor, I beg to differ with you. But I believe that's what in fact caused me to look up so precise and so immediate.

Id., pp. 18-19.

While the Ninth Circuit stated that Judge Silver understandably intended to non-verbally communicate with the

prosecutor to avoid interrupting defense counsel, the record is replete with instances where the judge interrupted defense counsel without any objection by the Government.

Clearly, this judge behaved as if she had a vested interest in the outcome of the trial from the very beginning. She refused to recuse herself when it was apparent that her employment with the U.S. Attorney's Office was concurrent with the investigation in this case. She refused to allow another judge to evaluate her potential bias and prejudice. Throughout the trial and all pretrial proceedings, she consistently sided with the prosecution and against the defense. She constantly threatened the Defendant and his counsel with contempt and sanctions. She precluded defense evidence, sustained most of the prosecutor's objections, and overruled most of the Defendant's. Defense counsel would always suffer the consequences whenever he accused Mr. Fink of misconduct. RT 11-7-96, pp. 30-39. (Where, again, defense counsel vilified and prosecutors congratulated for professionalism.) Finally, she allowed the prosecutor to engage in this continual and egregious misconduct and turned this trial into a theater of character assassination.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. HIRSH
Counsel of Record
JEFFREY J. ROGERS
HIRSH, BJORGAARD &
ROGERS, P.L.C.
177 North Church Avenue,
Suite 700
Tucson, Arizona 85701
(520) 624-4700
Counsel for Petitioner

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee.* v. WILLIAM L. SCHOLL, *Defendant-Appellant.*	No. 97-10143 D.C. No. CR-95-0576-1-ROS
UNITED STATES OF AMERICA, *Plaintiff-Appellant.* v. WILLIAM L. SCHOLL, *Defendant-Appellee.*	No. 97-10248 D.C. No. CR-95-0576-1-ROS ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeals from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted October 7, 1998
Submission Vacated November 20, 1998
Resubmitted January 20, 1999
San Francisco, California

Filed January 27, 1999
Amended March 17, 1999

Before: Robert R. Beezer, Cynthia Holcombe Hall and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Rymer

COUNSEL

Robert J. Hirsh and Jeffrey J. Rogers, Hirsh, Davis & Piccarreta, Tucson, Arizona, for the defendant-appellant-cross-appellee.

Robert L. Miskell, Assistant United States Attorney, Tucson, Arizona, for the plaintiff-appellee-cross-appellant.

ORDER

The opinion filed January 27, 1999 is amended as follows:

Slip opinion at 763, lines 4-6 replace, "To warrant reversal . . . public reputation of judicial proceedings.' " with, "In *United States v. Knapp*, as here, where the defendant failed to object to the materiality error, "[t]o warrant reversal in a case where a *Gaudin*-type error is made, the error must 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " "

With this amendment, the panel has voted to deny the petition for rehearing. Judge Rymer votes to reject the suggestion for rehearing en banc, and Judges Beezer and Hall so recommend.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

RYMER, Circuit Judge:

William L. Scholl appeals his conviction in the district court on four counts of filing false tax returns in violation of 26 U.S.C. § 7206(1) and three counts of structuring currency transactions in violation of 31 U.S.C. § 5324. The government cross-appeals the district court's imposition of sentence. We affirm in each instance.

I

Scholl was a Superior Court Judge in Tucson, Arizona, from 1984 until he was indicted. He was a compulsive gambler who took numerous trips to Las Vegas to gamble. Throughout the 1980s, he gambled on credit lines established at various casinos. In 1989, he had outstanding balances on credit lines from six different casinos

totaling $163,000. In the latter part of 1989 and the beginning of 1990, Scholl settled his outstanding credit line balances, paying a total of $50,000. From that point through 1994, he continued to gamble as a cash player.

Once he became a cash player, Scholl would purchase a cashier's check from his checking account or bank credit line payable to the casino where he was staying. He would deposit the cashier's check in the cage of that casino upon his arrival and draw against his deposit to gamble at various casinos during the trip. After the end of the trip, he would withdraw his deposit in the form of cash and transport the cash back to Tucson. Records were not kept of these withdrawals.

Upon returning to Tucson, Scholl would put the currency into the gun safe at his house. When he went to work, he would take one bundle of $5,000 in his pocket. At lunch time, he would deposit the money into a bank. He was aware that currency forms may be generated when a person deposits more than $10,000 in currency at a bank, and part of the reason he broke up deposits into amounts less than $10,000 in currency was to avoid the preparation of those reports. Scholl made numerous deposits in various accounts that avoided the reporting requirements and, in addition, made sub-$10,000 deposits into a personal credit line that was his main account for gambling.

Scholl's accountant, Ken Silva, had a conversation with Scholl in 1987 in which he told Scholl that both gambling winnings and gambling losses must be reported separately on Scholl's tax return. Scholl's 1987 return reflected "gambling winnings" of $128,680 and an

itemized deduction for "gambling losses" of $128,680. In connection with preparation of Scholl's 1988 tax return, Silva asked Scholl if he had any gambling winnings. Scholl responded that he did not have any, or that he had "lost his ass there." Scholl's tax returns for 1990 and 1993 do not reflect any gambling income or losses, and his returns for 1991, 1992, and 1994 reflect only small amounts. In each of those years, the only gambling income reported was gambling income of the type reflected on a Form W-2G, which he was required to file with the IRS.

Scholl testified to his belief that he could "net out" his gambling wins and losses in any particular year and, if losses exceeded wins, nothing needed to be reported on the return. He did not, however, "net out" gambling winnings that were reflected on Forms W-2G.

On December 5, 1995, a grand jury in Tucson, Arizona, returned an indictment charging Scholl with filing false tax returns for the years 1989 through 1994, in violation of 26 U.S.C. § 7206(1) (Counts 1 through 6), and five counts of structuring currency transactions to avoid the Treasury reporting requirements, in violation of 31 U.S.C. § 5324 (Counts 7 through 11). Trial to a jury began September 24, 1996. The court granted Scholl's motion for judgment of acquittal on Count 8. On November 19, the jury found Scholl guilty of counts 2, 3, 4, 6, 7, 9, and 10, but acquitted him on counts 1, 5, and 11. On February 27, 1997, the court sentenced Scholl to five years probation on each count, to run concurrently. Although Casino Market Analysis Center Reports and eyewitnesses indicated

that Scholl had substantial unreported winnings, the district court did not find them a sufficiently reliable indicator of tax loss to make a reasonable estimate for purposes of determining Scholl's offense level under the Guidelines.

Scholl timely appeals his conviction. The government cross-appeals from sentence, challenging the district court's failure to calculate Scholl's offense level based on a reasonable estimate of tax loss.

II

Scholl first argues that he was substantially prejudiced when the district court moved the trial from Tucson, where he lives, to Phoenix. His request for change of venue back to the Tucson division was denied. The denial of a motion for transfer should be overruled only if the district court abused its discretion. *United States v. Herbert*, 698 F.2d 981, 984 (9th Cir. 1983). We see none here.

Federal Rule of Criminal Procedure 18 provides, in relevant part:

> The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

The district court emphasized the convenience of a trial in Phoenix to witnesses (relying in part on the availability of more daily flights from Las Vegas to Phoenix than from Las Vegas to Tucson); the unavailability of a courtroom in Tucson to conduct the trial as scheduled; the effect such a transfer would have on resolution of pending motions

and discovery issues in other matters; substantial pretrial publicity in Tucson; and the efficiency to be gained by not transferring the matter to another judge. On the other hand, Tucson was the site of the offense and the home of the defendant, counsel for both the government and Scholl, and most of the principal witnesses; Scholl had particularly weighty family obligations; and trial in Tucson imposed burdens of travel and expense that would not otherwise have existed. While we might have decided the matter differently, the court considered the relevant facts in applying the proper standard. As such we cannot say that the denial of the transfer was an abuse of discretion. *See United States v. McMullen*, 98 F.3d 1155, 1159 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2444 (1997) ("Under the abuse of discretion standard, an appellate court may not simply substitute its judgment for that of the lower court . . . ").

III

Scholl maintains that he was unable to present a meaningful and truthful defense because the district court improperly and prejudicially limited the testimony of his compulsive gambling psychological expert; limited the number of character witnesses he was allowed to call; excluded evidence that would have laid the foundation for his compulsive gambling expert's testimony; excluded other defense evidence and witnesses; and excluded Scholl's expert witnesses on accounting and tax law. We disagree.

A

Scholl sought to have Dr. Robert Hunter, his expert on compulsive gambling, testify that pathological gamblers have distortions in thinking and "denial," which impact their ability and emotional wherewithal to keep records. He would have testified that compulsive gamblers do not want to keep records because that would force them to confront the reality of losses, which creates too much upheaval. Hunter also would have opined that a pathological gambler is not motivated by money, but believes that the next "big win" will fix their lives.

In a published opinion the district court applied the two-part analysis[1] set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). *See United States v. Scholl*, 959 F.Supp. 1189, 1194 (D. Ariz. 1997). The court concluded that a diagnosis of compulsive gambling disorder satisfied the validity prong of *Daubert*, and ruled that Hunter could testify that Scholl was a compulsive gambler at the time the alleged crimes occurred. However, the court limited Hunter's testimony to the ten diagnostic criteria for pathological gambling set forth on page 618 of the Diagnostic and

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[1] "First, we must determine nothing less than whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science'. . . . Second, we must ensure that the proposed expert testimony is 'relevant to the task at hand,' . . . i.e., that it logically advances a material aspect of the proposing party's case. The Supreme Court referred to this second prong of the analysis as the 'fit' requirement." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (citations omitted).

Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), and excluded proffered evidence regarding distortion in thinking and denial of the existence of a gambling problem. Distortion and denial are "Associated Descriptive Features" but are not regarded as sufficiently sensitive or specific to be recognized as diagnostic criteria.

The district court also excluded the proffered testimony under Federal Rules of Evidence 402 and 403, noting among other things that Hunter said it was not his opinion that gamblers could not truthfully report on their income tax returns. Hunter did not state that compulsive gamblers have no memory of what occurred when they prepare their tax returns. Accordingly the court ruled that Hunter's opinion on denial was not relevant and could be confusing, inconsistent, and misleading to the jury.

Meanwhile, we rendered decisions in *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997), and *United States v. Bighead*, 128 F.3d 1329 (9th Cir. 1997), upon which Scholl now relies to challenge the district court's limitations on Hunter's testimony. In *Morales*, we held that an accounting expert should not have been precluded from testifying that the defendant lacked bookkeeping competence because such an opinion does not go to the ultimate issue of intent, but rather to a predicate fact from which the jury may infer the necessary mens rea. 108 F.3d at 1037-38. In *Bighead*, we reiterated that *Daubert*'s test for the admissibility of expert scientific testimony does not require exclusion of expert testimony that involves specialized knowledge rather than scientific theory. 128 F.3d at 1330; *see also United States v. Cordoba*, 104 F.3d 225, 230

(9th Cir. 1997) (noting *Daubert* test inapplicable to proffered expert testimony based upon specialized, not scientific, knowledge). Scholl contends that *Morales* makes it clear that Hunter's testimony should not have been limited, and that in any event the district court erred by subjecting his proffer to *Daubert* analysis because Hunter's testimony about characteristics of compulsive gamblers was based on his own observations over the years, just as the expert's testimony in *Bighead* concerning behavioral characteristics of child abuse victims was based on her own observations.

We need not decide on which side of the line the proffer falls because the district court did not abuse its discretion under either *Daubert* or *Bighead* in finding that Hunter's testimony had essentially no probative value but substantial risk of prejudicial effect, and should therefore be excluded under Rules 402 and 403. The court stated that Hunter's "expert testimony would not be helpful to the jury because there is no 'fit' between his testimony and the issue of willfulness in this case. 959 F.Supp. at 1197. The court excluded Hunter's opinion regarding denial as "not relevant" pursuant to Rule 402 and "confusing, inconsistent and misleading" under Rule 403." *Id.*

At best, Hunter's opinion would have been that compulsive gambling disorder makes one believe that he has lost more money than he has won – not that it renders one unable to remember what occurred, or unable to enter both winnings and losses on a Form 1040. While Hunter was prepared to testify that Scholl could have misevaluated his winnings and losses and believed he was telling the truth, Hunter also acknowledged that

there was no support in the literature for this opinion or for the idea that pathological gamblers cannot truthfully report gambling income. Indeed, Hunter made it clear that it was not his opinion that compulsive gamblers cannot truthfully report income on their tax returns. Thus, evidence that compulsive gamblers are in denial, or that their thinking about gambling in relation to their life is distorted, would not tend to show that Scholl did not believe his tax return to be correct in reporting winnings and losses, or that he did not falsely subscribe to it specifically intending not to report gambling wins and losses.

Likewise, the excluded characteristics do not tend to negate materiality because even if one truly believes he has lost more than he has won, the numbers should be reported as information about winnings and losses is necessary to determine whether income tax is owed. *See* 26 U.S.C. § 7206(1). Thus, as the district court concluded, the proffered opinion on denial is not relevant. In any event, had Hunter been allowed to testify as proffered, his opinion may have been mistaken to mean that Scholl lacked intent to report wins or losses because of his disorder. This conclusion would have been without support either in the scientific community or Hunter's own experience. It would therefore have been misleading and confusing. For these reasons, the district court had discretion under Rules 402 and 403 to limit Hunter's testimony to well-recognized characteristics of compulsive gamblers, and to exclude that portion of his proffered opinion which had slight (if any) relevance, and was both speculative and misleading. *See Morales*, 108 F.3d at 1035

(reviewing exclusion of expert testimony for abuse of discretion).

B

Scholl also contends that the court erred in limiting him to three character witnesses in his case-in-chief on the footing that more would be cumulative.[2] Because a limitation on character witnesses is "left to the sound discretion of the judge," *Loux v. United States*, 389 F.2d 911, 917 (9th Cir. 1968), and Scholl fails to present "exceptional and compelling circumstances clearly indicat[ing] an abuse of discretion" on the part of the district court, *United States v. Henry*, 560 F.2d 963, 965 (9th Cir. 1977) (quoting *Wagner v. United States*, 416 F.2d 558, 564 (9th Cir. 1969)), there was none here. *Id.* at 965 ("We resist the implication that the number of [character] witnesses rather than the quality of their testimony should determine the strength of argument.").

C

Scholl contends that the district court improperly excluded defense evidence which would have laid the foundation for Hunter's testimony and evidence of his state of mind. First, he asserts that he was unable to explore the health problems of his children that were stressful to him. Plenty of evidence was admitted on this point and Scholl fails to identify any particular evidence that was improperly excluded. Secondly, Scholl contends

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[2] Two other witnesses testified to Scholl's good character during the government's case-in-chief.

his counsel was precluded from exploring with Mrs. Scholl discussions they had about gambling winnings and losses with respect to tax returns. However, the court ruled that these discussions were admissible. Counsel simply failed to pursue the line of inquiry after an objection was sustained to his lead-off question as leading.

D

Scholl challenges the exclusion of copies of nine cashier's checks as a sanction for discovery abuse pursuant to Fed.R.Crim.P. 16.[3] In light of representations made earlier that a "full forensic financial audit" had been conducted and turned over, and the fact that counsel had possessed

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[3] Federal Rule of Criminal Procedure 16(b)(1)(A) provides:

> If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, . . . which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

The sanctions for failure to comply with this Rule are provided in Rule 16(d)(2):

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. . . .

the records for some time, the court found that Scholl's failure to disclose the checks until after the jury was sworn was " 'a strategic decision to withhold the [evidence]' until the government would be unable to fully investigate." Our review is for abuse of discretion, *United States v. Duran*, 41 F.3d 540, 545 (9th Cir. 1994), and we see none.

The evidence was not "of decisive value," nor was the exclusion "disproportionate to the conduct of counsel." *Id.* (quoting *United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987) (per curiam) (describing test)). Although the checks themselves were not entered into evidence, the information contained on the checks was. Scholl was permitted to use the checks to refresh his recollection. The court's determination that failure to disclose the checks was deliberate is supported in the record, and the sanction was directly related to the offending conduct.

E

Scholl argues that the district court improperly disallowed the testimony of his proffered experts on tax and accounting law because *United States v. Brodie*, 858 F.2d 492 (9th Cir. 1988), the opinion partially relied upon by the district court in excluding the testimony, has since been overruled by *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997). Scholl's witnesses would have testified that Scholl's belief that he could "net out" his gambling wins and losses was reasonable because the law was confusing; that Scholl's record-keeping method met IRS

standards; and about whether Scholl's accountant met the requisite standard of care in preparing Scholl's returns.

Although Scholl correctly points out that *Brodie* has been overruled in part, the portion of *Brodie* overruled by *Morales* is not the same part discussed by the district court in excluding Scholl's proffered experts. *Morales* overruled *Brodie*'s analysis of Federal Rule of Evidence 704(b). *See Morales*, 108 F.3d at 1038 ("We overrule *Brodie*'s Rule 704(b) analysis which is inconsistent with this holding."). Rule 704(b) applies only to expert witnesses "testifying with respect to the mental state or condition of a defendant," Fed.R.Evid. 704(b), but Scholl's experts were to testify regarding the confusing state of tax and accounting law – not as to Scholl's individual confusion. That portion of *Brodie* remains good law, as

> [i]t is well settled that the judge instructs the jury in the law. Experts "interpret and analyze factual evidence. They do not testify about the law because the judge's special legal knowledge is presumed to be sufficient, and it is the judge's duty to inform the jury about the law that is relevant to their deliberations."

Brodie, 858 F.2d at 496-97 (quoting *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986)).

Furthermore, testimony concerning the reasonableness of Scholl's belief that he could net out wins and losses calls for a legal conclusion. As such, it is inappropriate matter for expert testimony. *See Aguilar v. International Longshoremen's Union*, 966 F.2d 443, 447 (9th Cir. 1992) (noting matters of law are for the court's determination, not that of an expert witness); *see also Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir. 1977)

(expert testimony consisting of legal conclusions inadmissible).

Regardless, even though the tax expert personally may have believed that gambling wins and losses could be netted out before he researched the issue, he also acknowledged that the Form 1040 Instructions Manual specifically states: "You cannot offset [gambling] losses against winnings and report the difference." Instruction for Form 1040 (1990), at 16. In addition, the proffered experts had no personal knowledge of any predicate matter relating to Scholl's own ability to understand the legal principles involved in reporting his gambling activity on tax returns. This further distinguishes *Morales*, where the proffered accounting expert sought to opine that the defendant had a weak grasp of accounting principles to counter testimony by the government's witnesses that she had a good understanding of the bookkeeping process. Finally, the exclusion of this expert testimony did not prevent Scholl from pursuing the theory that he believed he did not have to report anything if he thought his wins exceeded his losses. The reasonableness of what Scholl said he believed is irrelevant; the only relevant issue is whether Scholl actually had this belief (thus negating intent), and on this issue Scholl's proffered experts had nothing to say. In sum, as the district court explained, this "expert's personal experience with the tax laws was not relevant, would be confusing, and the prejudicial effect outweighed the probative value."

Testimony as to whether Scholl's record keeping practices met IRS standards would not have "assist[ed] the trier of fact to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702, because the jury

did not need assistance in applying the legal standard declared by the court – that taxpayers must maintain such records as are sufficient to determine the amount of income and deductions required to be reported on tax returns.

Nor did the court abuse its discretion in limiting expert testimony about whether Scholl's accountant exercised the proper standard of care. Scholl had already introduced into evidence a document published by the American Institute of Certified Public Accountants entitled "Statements on Responsibilities in Tax Practice," which detailed the "appropriate standards of tax practice outlining the extent of a CPA's responsibility to the clients, the public, the Government, and the profession," and had engaged in lengthy cross-examination of his accountant with respect to these guidelines and accounting standards of care in general. As the jury was provided with the governing standards and this testimony, the court did not abuse its discretion in determining that additional expert testimony would be a waste of time and would not assist the jury to understand the evidence or determine a fact in issue. *See* Fed. R. Evid. 403.

IV

Scholl contends that there was pervasive prosecutorial misconduct throughout the trial requiring reversal across the board. Specifically, he argues that the district court erred in denying his motion for mistrial based on misconduct in the government's cross-examination of character witnesses, Mrs. Scholl, and Scholl himself, as well as in the government's opening statement

and closing argument.[4] Denial of a motion for mistrial based on allegation of prosecutorial misconduct is reviewed for abuse of discretion. *See United States v. Davis*, 932 F.2d 752, 761 (9th Cir. 1991). "[T]he court should not reverse a defendant's conviction if substantial, independent and credible evidence of the defendant's guilt overwhelms whatever incriminating aspects inadmissible statements may have had in isolation." *Id.* (internal quotations omitted).

A

Relying on *United States v. Michelson*, 335 U.S. 469, 482, 69 S.Ct. 213, 221-22, 93 L.Ed. 168 (1948), Scholl first contends that the use of a "Did you know . . . ?" form of question instead of "Have you heard . . . ?" in cross-examination of character witnesses was improper. This argument is without merit because Federal Rule of Evidence 405, enacted after Michelson, informs the methods by which character may be proven and challenged. Rule 405(a) provides that "[o]n cross-examination, inquiry is allowable into relevant specific instances of conduct."

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[4] The questions that Scholl calls prosecutorial misconduct are mainly in areas deemed permissible by the district court. We treat Scholl's citations as he does, as instances of prosecutorial misconduct rather than as arguably erroneous rulings on evidence. Nevertheless we are mindful of Scholl's overarching argument that the entire trial was infected by prosecutorial misconduct and judicial bias. As we explain in connection with each of his specific arguments, however, we do not see the court's admission of any particular statement as reversible error in light of the overall evidence of Scholl's guilt.

Fed. R. Evid. 405. The Advisory Committee Notes emphasize that the distinction between asking an opinion witness "whether he knew" and "whether he had heard" is

> of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

Fed. R. Evid. 405, Adv. Comm. Notes.

Scholl also faults the government's cross-examination of Judge Lacagnina, a character witness who had testified that Scholl's "integrity is beyond question," regarding his knowledge of a $10,000 loan Scholl had accepted from an attorney who was counsel in a case over which Scholl presided while the loan was outstanding without disclosing it to all parties. In Scholl's view the question was improper because the government's characterization of the loan was unfair and misleading, as the case was "non-adversarial." The judge's attention was called to the Arizona Code of Judicial Conduct,[5] but the court limited

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[5] Arizona Supreme Court Rule 81 codifies Canon 4 of the Arizona Code of Judicial Conduct, which provides, in relevant part:

> D. Financial Activities, . . .
>
> (5) A judge shall not accept . . . a gift, bequest, favor or loan from anyone except for: . . .
>
> (h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose

further inquiry once the witness responded that the rule did not cover this situation. The questioning itself was not prosecutorial misconduct.

Scholl further cites as misconduct the cross-examination of Judge Lacagnina regarding charges brought by the Arizona Commission on Judicial Conduct, which included filing a false state financial disclosure form. However, the inquiry was relevant because the judge had testified to Scholl's truthfulness, honesty and integrity, and the government had a good faith basis for asking the questions given the publicly-filed Statement of Charges. While Judge Lacagnina was asked whether his opinion would be affected if the information in the Commission's complaint regarding Scholl's false statements on the state financial disclosure forms was shown to be true, the question did not assume Scholl's guilt on any of the counts in the indictment.

Next, Scholl argues that cross-examination regarding Scholl's attendance and vacation time was misconduct. No such inquiry was made on cross-examination, although on re-direct Scholl's counsel asked Judge Lacagnina if he had formed an opinion "as to whether defendant was doing his job." The witness responded that Scholl was a good judge, and talked about the work he put out and the quality of that work. On re-cross, and with permission of the court, the AUSA asked Lacagnina if he had heard that the Chief Judge of the Juvenile Court

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> interests have come or are likely to come before the judge; . . .

17A Ariz. Rev. Stat. Sup. Ct. Rules, Rule 81, Canon 4(D).

believed that Scholl had abused the attendance and vacation policies of the court. Although this strayed somewhat from the relevant character traits at issue in this trial, it was equally irrelevant for Scholl's counsel to inquire whether Scholl was "doing his job." In any event, this falls well short of being sufficiently prejudicial to warrant reversal. To the extent that Scholl suggests there was no basis for the government's belief that the Chief Judge's comments about his attendance had been discussed in the relevant community, Judge Lacagnina merely testified to his opinion, not to Scholl's reputation, so knowledge in the community was not a material predicate to that testimony.

Finally, Scholl argues that asking character witnesses whether they had heard that Scholl believed himself to be a compulsive gambler was improper because it had nothing to do with his character and the government had no good faith basis to believe that any of this had been discussed in the relevant community. However, Scholl could not have been prejudiced by this line of questioning because he himself invoked his compulsive gambling disorder in his defense, and his counsel said in opening statement that Scholl never concealed the disorder.

B

The government questioned Mrs. Scholl about the two houses the Scholls owned, a time-share in Hawaii and membership in the Oro Valley Golf Club. Scholl argues that these questions were appeals to class prejudice and therefore prosecutorial misconduct. However, Scholl's defense centered on his belief that he was losing

more money gambling than he was winning. Although marginal, the evidence adduced was probative of whether he actually held that belief and it was not misconduct for the government to elicit it.

Scholl's more serious complaint is that by precluding Mrs. Scholl from testifying as to the reasons for the purchase of the house next door, the court allowed the government to convey the false impression that the Scholls had purchased it simply because they were wealthy. In fact, Mrs. Scholl would have testified that the house was purchased to rent to a full-time caretaker for their disabled son. Even so, while the reason for purchasing the second property might have painted a more sympathetic picture for Scholl, it is the fact of the purchase, not the reason for it, that had probative value. If there were error, it was harmless and in any event, there was no reversible misconduct.

C

Scholl makes a number of loosely-connected misconduct charges about his own cross-examination. We treat these most summarily, because neither singly nor cumulatively do they constitute misconduct. Scholl opened the door to questions about how compulsive gambling affected his ability to follow the Canon of Judicial Ethics and act as a judge by contending that his gambling had not interfered with his work. Questions regarding when he disclosed his compulsive gambling problems were properly responsive to Scholl's position that he was "open as far as discussing [his] gambling activity." And questions about loans that he failed to

disclose on his state financial form were relevant to credibility.

Scholl's own statement that the propriety of his actions would be decided by the Commission on Judicial Conduct paved the way for the government to ask, with the court's permission, about Scholl's motivation to testify in a way that would affect the pending proceedings before the Commission. This did not have to do with the verdict in the criminal case, but with Scholl's testimony. Nor, contrary to Scholl's argument, did the government impermissibly suggest that he would return to the bench if not convicted. Regardless, the court instructed the jury that the decision of the Commission "is completely separate from the resolution you will make by verdict in this case." Finally, questions regarding why Scholl did not provide information to the government were not misconduct running afoul of *Doyle v. Ohio*, 426 U.S. 610, 617-20, 96 S.Ct. 2240, 2244-46, 49 L.Ed.2d 91 (1979), because Scholl claimed that he was never given the opportunity to present documents or cooperate as he had requested. *See McMillan v. Gomez*, 19 F.3d 465, 469-70 (9th Cir. 1994) (determining no *Doyle* error where prosecution refuted impression that defendant was cooperative by asking about later noncooperation).

Scholl contends that eliciting evidence from Mike Grayson regarding a prior bad act was misconduct. Grayson told an IRS investigator that he had seen Scholl win as much as $100,000 at a craps table at the Desert Inn, possibly in 1988 but most likely in 1990. The morning Grayson was to testify he told the IRS agent that based on further research he now believed the incident had occurred in 1986 or 1987. The court allowed Grayson to

testify pursuant to Federal Rule of Evidence 404(b). This decision was not improper. *Cf. United States v. Conforte*, 624 F.2d 869, 875-76 (9th Cir. 1980) (holding that a pattern of understatement of income in successive years is evidence of willfulness in a tax prosecution). Although Rule 404(b) requires pretrial disclosure of such evidence, that requirement may be excused "for good cause shown." Fed. R. Evid. 404(b). The court properly concluded that good cause was shown because, prior to trial, the government believed that the incident had occurred in 1990, not 1986. This was not an abuse of discretion, nor was it misconduct for the government to seek to introduce Grayson's testimony or to ask for relief from the pre-trial disclosure requirement.

Finally, Scholl submits that the AUSA committed misconduct in his examination of Richard Bock by asking whether Bock had discussed with Scholl the circumstances that led Scholl to be transferred to the juvenile court. Whether or not this line of questioning was proper, no prejudicial information was elicited. Bock testified that he did not believe that Scholl ever told him why he was transferred to juvenile court.

D

Scholl faults the AUSA for having said during his opening statement that Scholl could not prove that compulsive gambling was relevant to the case, knowing that the court had excluded such evidence. This is not quite correct, as the court had merely precluded Scholl's compulsive gambling expert from testifying to characteristics that the expert himself said did not affect the ability to

report winnings or losses truthfully on a tax return. Essentially the same point underlies Scholl's submission of misconduct in closing argument, and it fails for the same reason.

V

Scholl argues that pervasive judicial bias against him and favoritism toward the government denied him a fair trial.

A

Scholl first challenges Judge Silver's decision not to recuse herself. Scholl contends that Judge Silver, a former Assistant United States Attorney, should have recused herself pursuant to 28 U.S.C. § 455(b)(3), which directs a judge to disqualify himself "[w]here he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding . . . " 28 U.S.C. § 455(b)(3). We review the denial of a motion to recuse for abuse of discretion. *See United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997).

Scholl relies on *United States v. Arnpriester*, 37 F.3d 466, 467-68 (9th Cir. 1994), where we held that a judge who had been United States Attorney (and as such was responsible for the entire office) should have recused himself in a case under investigation during his tenure. Scholl's reliance is unwarranted. Judge Silver was an Assistant United States Attorney from 1980 through October 7, 1994, and for much of that time was the Chief

Criminal Assistant to the United States Attorney. However Judge Silver did not have supervisory power over the section of the office that investigated Scholl; she supervised only investigations in the Phoenix division, while the investigation of Scholl was performed by the Tucson division. Thus, *Arnpriester* does not require recusal and Judge Silver did not abuse her discretion in refusing to recuse herself.

B

Scholl later filed a motion for disqualification pursuant to 28 U.S.C. § 144, identifying ten bases that he contends showed that Judge Silver had a bent of mind against the defense and in favor of the government.[6] On appeal, Scholl argues that Judge Silver was required to refer the motion to another judge instead of ruling on it herself, as she did. We disagree, as the § 144 affidavit was neither timely nor sufficient to trigger reassignment. *See Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1388 (9th

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[6] These included the judge's mistreatment of previous defense counsel; requirement that previous defense counsel file affidavits in support of factual assertions; suggestion that Scholl should have hired Phoenix counsel to obviate Rule 18 problems; defense claims that Scholl's daughter's necessity to wear a pacemaker and had special needs were suspect because she was a high school golfer; general failure to address issues of government misconduct; changes in transcript of record made by the court reporter and recognized by the court; handling of Scholl's request for CJA appointment and Rule 17(b) request; permission to allow discovery of Scholl's expert and failure to require the government to pay expert's travel expenses; pretrial threats of imposition of sanctions; and issues relating to bias of Judge Silver's bailiff.

Cir. 1988) (holding that only after determining the legal sufficiency of a § 144 affidavit is a judge obligated to reassign decision on merits to another jūdge). It was filed less than 10 days before trial, and relied on the judge's prior service as an Assistant United States Attorney, which we have already explained did not require recusal, and actions taken by Judge Silver during the proceedings, which are not a proper ground for disqualification.

C

Nor does the remainder of Scholl's list of incidents warrant a new trial. A federal judge has broad discretion in supervising trial, and her behavior during trial justifies reversal only if she abuses that discretion. "A trial judge is more than an umpire, and may participate in the examination of witnesses to clarify evidence, confine counsel to evidentiary rulings, ensure the orderly presentation of evidence, and prevent undue repetition." *United States v. Laurins*, 857 F.2d 529, 537 (9th Cir. 1988). "A judge's participation justifies a new trial only if the record shows actual bias or leaves an abiding impression that the jury perceived an appearance of advocacy or partiality." *Id.* We have reviewed the record, and here as in *Liteky v. United States*, 510 U.S. 540 (1994), the grounds Scholl complains of mainly

> consist of judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses. All occurred in the course of judicial proceedings, *and* neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal

> antagonism that would render fair judgment impossible.

510 U.S. at 556 (italics in original). Judge Silver's judicial rulings and efforts at trial administration are an inadequate basis for disqualification.

There is one exception, having to do with the judge's mouthing "stand up" to the AUSA during defense counsel's closing argument. However, this was adequately explained by Judge Silver as intended to communicate that if counsel wanted to make an objection like he looked like he wanted to do, he should stand up. There is no indication the gesture was visible to or seen by the jury. While all communications with counsel should be audible instead of inaudible, the judge's reaction was an understandable, if regrettable, effort to avoid interrupting defense counsel's closing argument that we cannot say warrants reversal, for nothing suggests it had anything to do with the outcome.

VI

Scholl contends that the court improperly admitted Market Analysis Center (MAC) reports prepared by casinos to establish amounts allegedly won or lost by Scholl and the source of money he allegedly structured. The MAC reports were received under the business records exception to the hearsay rule, Fed. R. Evid. 803(6). The district court has "wide discretion" in determining whether a business record meets the trustworthiness standard, *United States v. Olano*, 62 F.3d 1180, 1206 (9th Cir. 1995) (citations omitted), and did not abuse its discretion here.

MAC reports are prepared by a floor worker at the casino that serve as estimates of particular gamblers' winnings or losses. Generally, the floor worker keeps track of cash or chips that the gambler has when he arrives at the table, records the average bet made by the gambler, and, to the extent possible, keeps track of how much money the gambler is winning or losing. Typically, this information is used by the casino to determine the amount of complimentary services to give the gambler.

Scholl argues that these reports should be inadmissible under Rule 803(6) because they are rough estimates and insufficiently trustworthy. However, a party need not prove that business records are accurate before they are admitted. "Generally, objections that an exhibit may contain inaccuracies, ambiguities, or omissions go to the weight and not the admissibility of the evidence." *United States v. Keplinger*, 776 F.2d 678, 694 (7th Cir. 1985); *see also La Porte v. United States*, 300 F.2d 878, 880 (9th Cir. 1962) (noting "the admissibility of a document, as distinguished from its weight, normally does not depend upon either completeness or freedom from ambiguity").

Discussing the policy behind Rule 803(6) in *United States v. Licavoli*, 604 F.2d 613 (9th Cir. 1979), we explained:

> The focus of the business records exception to the hearsay rule is on the requirements that the record be made in the course of and as a regular practice of a regularly conducted business activity. . . . There are circumstantial guarantees of trustworthiness in a record contemporaneously prepared by one who acts under a business duty

> of care and accuracy, particularly when the business entity for which the record is made relies on it.

Id. at 622 (citations omitted). In this case, the government established that the records were made at or near the time of the activity reflected in the records, made by a person with knowledge based on their observations, kept in the ordinary course of business, and made as part of the regular practice of the casinos' operations. Hence, the Rule 803(6) requirements were fulfilled.

To be sure the records are merely estimates, and crude ones at that. However, as the Tenth Circuit held in a § 7206(1) case involving failure to report gambling income, estimates or averages given by witnesses are sufficient to demonstrate a substantial understatement in the wagers reported by a defendant. *See United States v. Hallmark*, 911 F.2d 399, 402 (10th Cir. 1990). Here as in *Hallmark*, the government "did not have to prove the exact amount by which [the defendant] misstated the tax returns; the witness' [estimates] demonstrated substantial understatements in the wagers he reported." *Id.*

Furthermore, Scholl had the opportunity to attack the reliability of the MAC reports at trial and did so. The jury was informed that the reports were mere estimates. Given that the records are trustworthy for what they are – estimates – and that Scholl was permitted to elicit testimony going to their questionable accuracy, and we conclude that the MAC reports were properly admitted into evidence.

VII

A

Scholl contends that his § 5324 convictions must be vacated because the government submitted no proof that he knew the alleged structuring was illegal. To violate 31 U.S.C. § 5324, a defendant must (1) intentionally structure financial transactions, (2) with the purpose of avoiding the currency reporting requirements, and (3) with the knowledge that the conduct is unlawful. *See Ratzlaf v. United States*, 510 U.S. 135, 136-37, 114 S.Ct. 655, 657, 126 L.Ed.2d 615 (1994). Willfulness rarely can be proved by direct evidence that the defendant knew of the illegality of structuring; instead, it is usually established by drawing reasonable inferences from the available facts. *United States v. Tipton*, 56 F.3d 1009, 1012 (9th Cir. 1995) (citations omitted). A jury may find the requisite knowledge that the structuring was unlawful by drawing reasonable inferences from the evidence of defendant's conduct. *Id.* at 1012-13 (quoting *Ratzlaf*, 510 U.S. at 149 n.19).

The evidence at trial, viewed in a light most favorable to the prosecution, allowed a rational factfinder to infer Scholl knew that structuring his deposits was illegal. Scholl admitted that he was aware financial institutions must report currency transactions of $10,000 or more, and that he divided his deposits into amounts less than $10,000 "in part" to avoid triggering this requirement. Whenever Scholl made two deposits on the same day, he made the deposits at different banks. By using different banks, he concealed from each bank the fact that he was making multiple deposits. Furthermore, virtually all of Scholl's deposits were in amounts of $5,000 or less.

Thus, Scholl was making more than the minimum number of deposits necessary to avoid the reporting requirements. *See United States v. Beidler*, 110 F.3d 1064, 1070 (4th Cir. 1997) ("Based upon the fact that Beidler made more deposits than the minimum necessary to evade the reporting requirements, the jury reasonably could have inferred that Beidler intended to conceal his structuring because he knew structuring was illegal.")

Furthermore, a "jury may infer knowledge of the law from a defendant's education and expertise." *See United States v. Simon*, 85 F.3d 906, 910 (2d Cir.), *cert. denied*, 117 S.Ct. 517 (1996) (§ 5324 structuring transaction of a licensed stockbroker). Given Scholl's legal training, career on the bench, and the credibility of his testimony, the jury rationally could have disbelieved Scholl's testimony that he did not know structuring was illegal. *See United States v. Kenny*, 645 F.2d 1323, 1346 (9th Cir. 1981) ("When the defendant elects to testify, he runs the risk that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth.") (citations omitted). Thus, while not overwhelming, there is sufficient evidence in the record from which a reasonable factfinder could conclude, by drawing permissible inferences, that Scholl knew his structuring activity was illegal.

B

Scholl contends that there was insufficient evidence of materiality to sustain a conviction under § 7206(1). The elements of a violation of 26 U.S.C. § 7206(1) are: (1) the defendant made and subscribed a return, statement, or other document that was incorrect as to a material matter;

(2) the return, statement, or other document subscribed by the defendant contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and (4) the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law. *See United States v. Marabelles*, 724 F.2d 1374, 1380 (9th Cir. 1984). Whether there was an actual tax deficiency is irrelevant because the statute is a perjury statute. *See United States v. Marashi*, 913 F.2d 724, 736 (9th Cir. 1990).

Since Scholl's trial, we considered the materiality requirement of § 7206(1) in light of the Supreme Court's decision in *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), in *United States v. Uchimura*, 125 F.3d 1282 (9th Cir. 1997), *cert. denied*, 119 S.Ct. 151 (1998). There we held that, for purposes of § 7206(1), "information is material if it is necessary to a determination of whether income tax is owed." 125 F.3d at 1285. We also noted that materiality necessarily depends on the facts of each case. *Id.*

The Internal Revenue Service must be able to measure gambling income against gambling losses in order to determine whether income tax is owed. When gambling income and losses are both knowingly omitted, a reasonable jury could conclude that the information was necessary to a determination of whether income tax is owed. Whether Scholl believed (correctly or incorrectly) that he had lost more than he had won is irrelevant. *See United States v. Holland*, 880 F.2d 1091, 1096 (9th Cir. 1989) (holding "any failure to report income is material"). As there is

no dispute that Scholl failed to report winnings and losses, in this case that evidence suffices to show that the return was not correct as to a material matter.

VIII

Scholl contends that he was prejudiced by two improper jury instructions: (1) the materiality instruction that he argues improperly took the issue from the jury; and (2) the instruction on recordkeeping that he asserts created a strict liability guilt assumption in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

A

Section 7206(1) makes it a crime for a person to file a tax return "which he does not believe to be true and correct as to every material matter." 26 U.S.C. § 7206(1). Consistent with *Gaudin*, the district court submitted the element of materiality to the jury. The instruction read as follows:

> The tax return must be false as to a material matter. To be material, the statement must have a natural tendency to influence, or to be capable of influencing, the decision making body to which it is addressed.
>
> If you find the defendant made a false statement on his tax return relating to gross income, regardless of the amount, that is to say, if you find that the defendant received income in addition to that reported on his tax return,

> regardless of the amount, such omission of income is a material matter.

Scholl did not object to the definition of materiality.[7]

Scholl argues that although the issue of materiality was given to the jury (as it should have been under *Gaudin*), the instruction was tantamount to instructing the jury that *any* omission of income was material as a matter of law. This, he submits, is no longer the law of the Ninth Circuit in light of *Uchimura*, which noted that

> just because a jury usually would agree with [the statement in *Holland* that 'any failure to report income is material'] does not mean that a jury must agree with it, as a matter of law. Even if any failure to report income is material in most circumstances, it is not necessarily material in all circumstances, since the materiality of an underreporting of income necessarily depends on the facts of each case.

Uchimura, 125 F.3d at 1285-86. Yet as we have already explained, on the facts of this case there is no dispute that Scholl won and lost but failed to report what he won or what he lost. In *United States v. Knapp*, as here, where the defendant failed to object to the materiality error, "[t]o warrant reversal in a case where a *Gaudin*-type error is made, the error must 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Knapp*, 120 F.3d 928, 933 (9th Cir.), *cert. denied*, 118 S.Ct. 417 (1997) (citations omitted). *Knapp* dealt with the

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[7] Scholl requested a substantiality instruction but does not argue that its rejection was error. Rather, he focuses on the absence of an instruction consistent with *Uchimura* as he reads it.

very similar situation of taking from the jury's consideration the element of materiality of a filing false currency report charge, and held it was not reversible error because the evidence of materiality in the defendant's failure to report properly several transactions in excess of $10,000 was overwhelming. In this case, as in *Knapp*, the evidence of materiality in Scholl's failing to report money he lost or money he won was overwhelming, thereby precluding reversal.

B

Over Scholl's objection, the jury was instructed that

> [a]n individual is required to keep such records as are sufficient to establish the amount of gross income (other than gross income from wages and salary) and deductions required to be shown on a tax return.

Scholl contends that this creates a "strict liability guilt assumption" in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). This argument also fails. None of the charged crimes involves a failure to keep records, nor would the keeping of adequate records have exonerated Scholl had he nonetheless violated § 7206(1). Therefore the burden of proof was not shifted nor was the government relieved of its obligation to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

CROSS-APPEAL

IX

The government contends that the district court erred by failing to make a reasonable estimate of tax loss in calculating Scholl's offense level. Under U.S.S.G. § 2T1.1(a), the offense level for filing false tax returns is either the level from the tax table (§ 2T4.1) corresponding to the tax loss, or level 6 if there is no tax loss. Where the tax loss is uncertain, the court shall "make a reasonable estimate based on the available facts." U.S.S.G. § 2T1.1, comment (n.1).

At sentencing, the district court found it could not make a reasonable factual estimate of any tax loss and imposed an offense level of 6. The government argues that the district court should have relied on casino records or, alternatively, testimony concerning unchallenged gambling winnings to calculate the tax loss. Scholl responds (and the record reflects) that the court attempted to make such a determination but, after review of the evidence, found that no reasonable estimate could be made.

We cannot say that this was clearly erroneous. The evidence showed that Scholl failed to report both gambling income and gambling losses. This was a material misstatement, and the jury found that this misstatement was willful. These findings support a conviction under § 7206(1). However, the jury was not required to find how much of a misstatement it was. The court was free to do so, and to find that there was insufficient evidence to make a reasonable estimate of tax loss. Nor can we say that the court erred in finding that Grayson's testimony

as to when one of the big wins occurred was speculative, or that, with respect to the second win, other evidence indicated losses in that same year exceeded the size of the win. Given that the record does not compel a finding of a reliable estimate of the magnitude of any tax loss that occurred as a result of Scholl's gambling activity and false tax returns, the district court did not err in determining that no reasonable estimate could be made or in applying the Sentencing Guidelines as it did.

AFFIRMED.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM L. SCHOLL, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellant, v. WILLIAM L. SCHOLL, Defendant-Appellee.

No. 97-10143, No. 97-10248
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
1999 U.S. App. LEXIS 4245

March 17, 1999, Filed

DISPOSITION: [*1] Petition for rehearing DENIED and suggestion for rehearing en banc REJECTED.

JUDGES: Before: Robert R. Beezer, Cynthia Holcomb Hall and Pamela Ann Rymer, Circuit Judges.

OPINION: ORDER

The opinion filed January 27, 1999 is amended as follows:

Slip opinion at 763, lines 4-6 replace, "To warrant reversal . . . public reputation of judicial proceedings,' " with, "In *United States v. Knapp*, as here, where the defendant failed to object to the materiality error, "to warrant reversal in a case where a *Gaudin*-type error is made, the error must 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " "

With this amendment, the panel has voted to deny the petition for rehearing. Judge Rymer votes to reject the suggestion for rehearing en banc, and Judges Beezer and Hall so recommend.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

TITLE 26 – INTERNAL REVENUE CODE

Subtitle F – Procedure and Administration

CHAPTER 75 – CRIMES, OTHER OFFENSES, AND FORFEITURES

Subchapter A – Crimes

PART I – GENERAL PROVISIONS

Sec. 7206. Fraud and false statements

Any person who –

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

APPENDIX D

Sec. 5322. Criminal penalties

(a) A Person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315) shall be fined not more than $1,000, imprisoned for not more than one year, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both.

(c) For a violation of section 5318(2) of this title or a regulation prescribed under section 5318(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.

Sec. 5324. Structuring transactions to evade reporting requirement prohibited.

-STATUTE-

(a) Domestic Coin and Currency Transactions. – No person shall for the purpose of evading the reporting requirements of section 5313(a) or 5325 or any regulation prescribed under any such section

(1) cause or attempt to cause a domestic financial institution to fail to file a report

required under section 5313(a) or 5325 or any regulation prescribed under any such section;

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) or 5325 or any regulation prescribed under any such section that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

(b) International Monetary Instrument Transactions. – No person shall, for the purpose of evading the reporting requirements of section 5316 –

(1) fail to file a report required by section 5316, or cause or attempt to cause a person to fail to file such a report;

(2) file or cause or attempt to cause a person to file a report required under section 5316 that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any importation or exportation of monetary instruments.

(c) Criminal Penalty. –

(1) In general. – Whoever violates this section shall be fined in accordance with title 18, United States Code, imprisoned for not more than 5 years, or both.

(2) Enhanced penalty for aggravated cases. – Whoever violates this section while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period shall be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of title 18, United States Code, imprisoned for not more than 10 years, or both.
